***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

553

No. 22,222

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION–DANVILLE WORKS,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
*Intervenor.*

On Petition To Review and Set Aside and on Cross-Petition To Enforce an Order of The National Labor Relations Board After Proceedings Pursuant to Remand

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD



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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF ISSUE PRESENTED

The issue presented, as stipulated by the parties in the prehearing conference stipulation, is as follows:

Whether, in the circumstances of this case, the Board has the power and authority under the National Labor Relations Act to order the Company to grant to the Union a contract clause providing for the checkoff of union dues.

In accordance with Rule 8(d) of the General Rules of this Court the Board states that this case was previously before a panel of this Court upon petitions by the Union (No. 19,492, *United Steelworkers of America, AFL-CIO v. National Labor Relations Board)*, and the Company (No. 19,507, *H. K. Porter Co., Disston Division–Danville Works v. National Labor Relations Board*), and upon the Board's cross-petition for enforcement. The case was remanded for further consideration on December 8, 1967, and is now before this court on a record which includes the original record on appeal.

## COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of the H. K. Porter Company, Inc., Disston Division–Danville Works, hereafter called the Company, to review and set aside a supplemental decision and order of the National Labor Relations Board, issued after proceedings pursuant to this Court's remand opinion of December 8, 1967, in Numbers 19,492 and 19,507, *United Steelworkers of America, AFL-CIO (H. K. Porter Co., Inc.) v. N.L.R.B.*, and reported at 128 U.S. App. D.C. 344, 389 F.2d 295. The Board has cross-petitioned for enforcement of its order, reported at 172 NLRB No. 72 (1968) (S. D. & O. 1-5),[1] asking that it be enforced in full. This Court

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[1] "S. D.&O." references are to the supplemental decision and order of the Board. "J.A." references are to the pages of the joint appendix printed in the earlier court proceedings. When, in a series of references a semi-colon appears, references preceding the semi-colon are to the Board's finding of fact, those following to the supporting evidence.

has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*), hereafter called the Act, and upon the Court's prior exercise of jurisdiction over these parties and this proceeding.

## I. THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board found, based upon the circumstances present during the Company's prior bad faith refusals to bargain in violation of Section 8(a)(5) and (1) of the Act, that the Company should grant to the Union a contract clause providing for the checkoff of union dues. The substantially undisputed facts upon which this order rests are summarized below.

### A. The former proceeding

The Board's Decision and Order in the prior proceeding is reported at 153 NLRB 1370 (J.A. 58-59). Briefly stated, the underlying facts as found therein by the Trial Examiner and adopted by the Board are as follows:

#### 1. The Bargaining Negotiations

On October 5, 1961, following its victory in a Board election, the Union, United Steelworkers of America, AFL-CIO, was certified as the collective bargaining representative of the approximately 300 production and maintenance employees at the Company's Danville, Virginia, plant (J.A. 45-46; 17-18, 39, 42). Through November 27, 1962, the Company and the Union met 28 times for the purpose of negotiating a contract, but failed to reach agreement (J.A. 46). Upon charges filed by the Union, the Board, in an unreported decision, found that the Company had failed to bargain in good faith, *inter alia*, by adamantly refusing to agree to an arbitration provision while insisting upon a no-strike clause in the contract, by unilaterally changing conditions of employment, and by refusing to meet at

reasonable times (J.A. 46). On July 17, 1964, the United States Court of Appeals for the Fourth Circuit granted summary enforcement of the Board's order (J.A. 46).[2]

In October, 1963, bargaining resumed, with 14 issues in dispute (J.A. 47, 49; 12-13). By September 10, 1964, 21 meetings had taken place but no final agreement was reached and negotiations ceased (J.A. 47; 13-14, 44). When the second round of negotiations broke off, three items remained unresolved: wages, insurance, and checkoff – that is, the deduction of union dues by the Company from employees' paychecks (J.A. 47; 14-15). A checkoff was discussed at virtually every bargaining session but the Company continually refused the request, claiming that collection of dues was the "union's business" (J.A. 47; 17, 27-28). In an effort to reach accord, on several occasions the Union offered to withdraw its checkoff request if the Company would permit the Union to collect dues during non-working hours in non-working areas of the plant (J.A. 47; 17, 23). The Company rejected these proposals also (J.A. 47; 17).

At the hearing, the Company admitted that the Company had no general policy against a dues check-off and that the Company had collective bargaining agreements with unions at other plants containing checkoff provisions (J.A. 48; 25, 28). The Company also admitted that the refusal to grant the checkoff was not based on "inconvenience to the company," pointing out that the Danville plant, pursuant to voluntary authorizations of the employees, regularly made payroll deductions for the purchase of United States Savings Bonds, insurance coverage for employees dependents, contributions to the United Givers Fund and a "Good Neighbor Fund" (J.A. 48; 25-28, 44).[3] Rather, Jones, the Company's plant manager and

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[2] The Company did not except to the Trial Examiner's findings, conclusions, and recommended order (J.A. 46).

[3] The Good Neighbor Fund, a weekly payroll deduction to pay for gifts to hospitalized employees, plant parties, special charitable donations and the like, had been discontinued about a year prior to the hearing (J.A. 48, n. 7; 26).

chief negotiator, explained that the Company would not "aid and comfort the International at this location" by allowing the Union to collect dues at any time on company property (J.A. 47; 16-17, 27-30, 33-35).

### 2. The Board's Conclusion and the Decision of This Court

Upon the basis of the foregoing facts and the entire record, the Board, adopting the Trial Examiner's decision and recommended order (J.A. 58), held that the Company failed to bargain in good faith on the check-off issue, in violation of Section 8(a)(5) and (1) of the Act (J.A. 50-51, 58). The Board found that the Company's position with respect to checkoff, and its rejection of the Union's substitute proposals, was motivated, not by good faith considerations, but by a desire to frustrate agreement with the Union (J.A. 49). To remedy this violation, the Board issued a second order directing the Company to cease and desist from the unfair labor practices found and to bargain with the Union upon request (J.A. 51-53). The Board declined, however, to order the Company to agree to some form of checkoff, as requested by the Union (J.A. 51, n. 9).

On May 19, 1966, this Court (Judge Miller, dissenting) held that the Board's findings were supported by substantial evidence, and enforced the order. *United Steelworkers of America, AFL-CIO (H. K. Porter Co.) v. N.L.R.B.*, 124 U.S. App. D.C. 143, 363 F.2d 272, *cert. denied* 385 U.S. 851 (1966). In enforcing, the Court noted that "[w]hile it is clear from the record that the Company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off," it was found "not necessary to include a specific reference to the check-off in the Board's order" (124 U.S. App. D.C. at 147, 363 F.2d at 276), but noted: "To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (124 U.S. App. D.C. at 147, n. 16, 363 F.2d at 276, n. 16).

## B. The Present Proceedings

In subsequent contract negotiations the Company and the Union each urged different interpretations of the Court's decree. The Company proposed making available to the Union space in the payroll office, under its assumption that the decree only required it to discuss checkoff or possible alternative means of dues collection. (128 U.S. App. D.C. at 346, 389 F.2d at 297). The Union interpreted the decree as requiring the Company to agree to a contractual dues checkoff provision, in addition to a right to collect dues in a nonworking area of the plant (*Ibid.*).

On February 28, 1967, the Union filed a motion in this Court for a clarification of the decree (128 U.S. App. D.C. at 347, 389 F.2d at 298). This motion was denied by the Court on March 22, 1967, with an invitation to the Board to "test the competing interpretations of the decree through its contempt process" (*Ibid.*). On June 22, 1967, the Board's Regional Director wrote the parties that he would not recommend contempt proceedings and that the case was being closed on compliance (*Ibid.*).

Thereupon, on July 27, 1967, the Union asked this Court to reconsider its earlier denial. The motion was granted with the Court stating that the Company could not "purge itself of its bad faith and meet its Section 8(d) requirements by agreeing simply to negotiate on alternatives to checkoff" (*Ibid.*). The Court noted that the Board has the "final responsibility for interpreting" its order with respect to the "relation of remedy to policy," but that, "since the bargaining impasse may continue . . . some guidance from the court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order" (*Ibid.*). The Court stated that while neither party is required to make a concession under Section 8(d) of the Act, that Section relates to the question of good faith bargaining under Section 8(a)(5), while here the Company bargained in bad faith and the question is one of remedy under

Section 10(c) of the Act (128 U.S. App. D.C. at 348, 389 F.2d at 299). This Court set forth two possible alternatives as a remedy where "the company had conceded it had no business reason for refusing the checkoff:" (1) granting of the checkoff by the Board in return for a reasonable concession by the Union or, (2) in the proper case the Board could simply order the Company to grant a checkoff (128 U.S. App. D.C. at 348-349, 389 F.2d at 299-300).

## II. THE BOARD'S ORDER

Upon reconsideration, the Board directed that the Company grant a checkoff provision to the Union. In so ordering, the Board noted that the Company had twice violated Section 8(a)(5) and admittedly had no business reason for opposing the checkoff but did so to frustrate agreement with the Union. Accordingly, the Board concluded that an order to grant checkoff was warranted in the circumstances presented (S. D.&O. 3). The Board ordered a checkoff but did not require a concession by the Union because to do so "would imply that the Respondent [company] is now being ordered to surrender a position it had legitimately maintained" (S. D.&O. 3). The Board amended its original order to the extent of requiring the Company to grant a checkoff provision to the Union (S. D.&O. 4).

## ARGUMENT

### IN THE CIRCUMSTANCES OF THIS CASE, THE BOARD PROPERLY ORDERED THE COMPANY TO GRANT TO THE UNION A CONTRACT CLAUSE PROVIDING FOR THE CHECKOFF OF UNION DUES

In finding that the Company bargained in bad faith for the second time, the Board initially ordered the Company to bargain in good faith with the Union. Remanding the case to the Board, this Court noted that the Company having "flouted its Section 8(a)(5) duty", the Board is empowered

to require such party "to make meaningful and reasonable counteroffers, or indeed even make a concession where such counteroffers or such a concession would be the only way for the Company to purge the stain of bad faith that has already soiled its position." 128 U.S. App. D.C. at 348, 389 F.2d at 299. Having been authorized by the Court to enter an order requiring the Company to grant checkoff, the Board issued such an order, but did not require a "reasonable concession" by the Union, because, as noted *supra*, p. 7, this would imply that the Company was "being ordered to surrender a position that it had legitimately maintained."

It is to be noted at the outset that the Company does not challenge the Board's choice of this alternative remedy, if in fact the Board has remedial power to grant either remedy. Moreover, the Company opens its argument by recognizing that this Court "has already ruled adversely to the Company on the specific issue now presented," conceding, in effect, that the propriety of the Board's order is now the "law of the case." Of course, "the rule of the 'law of the case' would not prevent a different conclusion, if a clear case were presented showing that the earlier adjudication was plainly wrong and that the application of the rule would work manifest injustice . . . ." *Brown v. Gesellschaft Fur Drahtlose Tel., M.B.H.*, 70 App. D.C. 94, 95, 104 F.2d 227, 228 (1939), cert. denied 307 U.S. 640 and cases cited. We submit, however, that the Company has made no such showing here.

In limiting itself to a discussion of the Board's remedial *power*, the Company tacitly admits that the facts of this case warrant the remedy if the Board's action is not in contravention of the statute. Such an admission is not surprising in light of the Company's record of bad faith bargaining since the Union's initial certification as collective bargaining representative in 1961 – much of this time in defiance of court decrees – and the limited nature of the Board's order. In this respect then, the Company recognizes the controlling principle that determining an appropriate remedy for unfair labor practices is a matter falling squarely within the discretion

of the Board. For in expunging the effects of unfair labor practices, Section 10(c) of the Act empowers the Board, upon finding that an unfair labor practice has in fact been committed, to require the employer to "take such affirmative action . . . as will effectuate the policies of the Act." As the Supreme Court has held:

> That section 'charges the Board with the task of devising remedies to effectuate the policies of the Act.' *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one subject to limited judicial review. *Ibid.* '[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . .' *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194 . . . . The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co. v. Labor Board*, 319 U.S. 533, 540.

*Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964); See *United Steelworkers of America v. N.L.R.B.*, 126 U.S. App. D.C. 215, 376 F.2d 770 (1967), cert. denied 389 U.S. 932; *International Union, UAW v. N.L.R.B.*, 124 U.S. App. D.C. 215, 220 n. 7, 363 F.2d 702, 707 n. 7 (1966), cert. denied 385 U.S. 973. In adapting remedies to particular situations, the Board must weigh the efficacy of alternative approaches and draw upon its acquired expertise in the practical workings of industrial relations. The Board's choice of remedies is limited only by the requirement that they be "functions of the purposes to be accomplished." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).

As an original proposition, the Board's choice of remedy clearly would be proper here. The Company has engaged in a protracted unlawful effort to undermine the union. The checkoff remedy helps restore the situation which existed prior to the Company's unlawful conduct. Although the

employees must still voluntarily authorize the checkoff, the Board's order may enable the Union to rebuild itself as an effective bargaining representative, and through better communications, to counter the impact of the Company's unlawful conduct.[3a] As this Court and other courts have recognized in other situations, the Board may properly direct remedies which aid a union in regaining its lawful status – that is, the Board may restore the imbalance in relationships created by unfair labor practices. See, for example, *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B.*, 127 U. S. App. D. C. 303, 305 n. 4, 383 F.2d 230, 234 n. 4 (1967) where the employer was required to assemble its employees, on company time and expense, to allow the union to give a presentation of its position; *Standard Oil of California v. N.L.R.B.*, 399 F.2d 639 (C.A. 9, 1968), where the employer was required to furnish the union with names and addresses of company employees to enable the union to distribute literature in support of its position; *J. P. Stevens and Co., Inc. v. N.L.R.B.*, 380 F.2d 292, 303-305 (C.A. 2, 1967), cert. denied, 389 U. S. 1005, where the employer was required to assemble the employees to have the notice read to them; *N.L.R.B. v. H. W. Elson Bottling Co.*, 379 F.2d 223, 226 (C.A. 6, 1967) and *J. P. Stevens & Co., Inc. v. N.L.R.B.*, 388 F.2d 896, 905 (C.A. 2, 1967) where the employer was required to allow the union access to company bulletin boards.

The check off remedy here is particularly appropriate on balance since the record establishes, and this Court found (128 U. S. App. D. C. at 346, 389 F.2d at 297) that the Company "made deductions from volunteering employees' wages for a variety of charitable causes" and would experience "no inconvenience . . . in checking off union dues . . ." Thus, the remedy formulated helps restore the Union's bargaining status while being of slight moment to the Company. As this Court stated (128 U. S. App. D. C. at

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[3a] "The Union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 Company employees live within a radius of from 35 to 40 miles from Danville." (124 U. S. App. D. C. at 145, 363 F.2d at 274).

351, 389 F.2d at 302): "a provision which is included in 92 per cent of all manufacturing industries labor contracts [citation omitted] is likely to be of life or death import to the fledgling union . . . while it is of no consequence whatever to the employer."

The difficulty arising from the use of such a remedy is Section 8(d) of the Act, which states that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." This Court addressed itself to that difficulty and determined that Section 8(d) relates to "*whether* a Section 8(a)(5) violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." 128 U.S. App. D.C. at 348, 389 F.2d at 299. Thus, Section 8(d) by its terms is not *controlling* as to remedy.

Nevertheless, as this Court recognized, the statutory provision evinces a Congressional concern for freedom of contract and "remedies which impinge on it are not to be casually undertaken." 128 U.S. App. D.C. at 349, 389 F.2d at 300. However, as the Court also notes, the employees' right to collective bargaining is the "primary right" secured by the Act and the Board's traditional remedial orders have not proved adequate against employers set on defeating that right, because they frequently do not in fact restore the *status quo ante.*[4] Accordingly, the Court concluded that where

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[4] As noted in *Ross, The Labor Law in Action/ An Analysis of the Administrative Process under the Taft-Hartley Act* 30 (1966); reprinted in 63 *Lab. Rel. Rep.* 132 at 152 (1966):

> The basic purpose of the statute is to protect the rights of employees to engage or refuse to engage in collective bargaining. The successful frustration of employee rights by unlawful means is a serious matter with consequences that surely extend beyond the individuals who happen to be involved in a particular proceeding. . . . A weakening of employers' willingness to comply with the law has undesirable consequences. These include, as part of the Board's burden, an increase in merit charges and a disproportionate increase in litigation cases. For society as a whole, the probable result may be a rise in strikes induced by a widespread cynicism of the value of Board procedures.

the policy of Section 10(c) prescribing remedial measures conflicts with Section 8(d) prescribing freedom of contract, "the Board must seek to devise remedies which best effectuate the one at the least cost to the other. While it is true that an order requiring a checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively." 128 U.S. App. D.C. at 350, 389 F.2d at 301. Accordingly, in this Court's view, the Board clearly has the *power* to issue such an order and, as noted above, the Company does not question the reasonableness of the Board's exercise of that power here.[5]

Contrary to the Company's suggestion, intrusion by the Board into contract matters is not without precedent. Thus, in *N.L.R.B. v. C. & C. Plywood Corp.*, 385 U.S. 421, 427 (1967), the Court rejected an argument similar to that made by the Company here – namely, that the Congressional policy against the Board's finding an unfair labor practice based on a mere breach of a collective bargaining agreement prohibits the Board from deciding any case involving the interpretation of a labor contract. Also, in *N.L.R.B. v. Beverage–Air Co.*, ___F.2d ___ (C.A. 4, No. 11961, September 27, 1968, 69 LRRM 2369, 2373), the court approved a Board order giving the union the option of accepting a renewal of a contract which the employer unlawfully refused to sign or treating the contract as not renewed and insisting on bargaining toward a new contract. Again, in *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 923 (C.A. 2, 1965), the necessity for an effective remedy, rather than purported consent, was considered warrant for the *extension* of a collective bargaining agreement which the employer had unlawfully refused to sign and which would have expired by its terms prior to the court's decision.

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[5] "Using an order to concede is a logical remedy once bad faith is found." *Forced Concessions as a Possible NLRB Remedy*, 68 Colum. L. Rev. 1192, 1195 (1968).

Cases cited by the Company as inconsistent with the remedy granted here are clearly distinguishable. The court case cited, *Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 125 U.S. App. D.C. 389, 373 F.2d 655 (1967), involved a Board order requiring the company to execute a contract for certain stores, but the order was predicated on a factual finding that a "national agreement" had been reached by the employer and the union, a finding this Court found "lacks support in the record." 125 U.S. App. D.C. at 393-394, 373 F.2d at 659-660. Accordingly, the Court found it unnecessary to "decide whether the Board's order would be within its broad authority to fashion appropriate remedies to effectuate the purposes of the Act." (*Id.*). The factual basis for the remedy in the present case is not questioned.[6]

In sum, the Board's conclusion comports with the principles explicated by this Court. The premise for the Board's order (Supp. D. & O. p. 3) – that the Company "has repeatedly violated Section 8(a)(5) and admittedly had no business reason for opposing checkoff, and its only reason for such opposition was to frustrate agreement with the Union" – is unquestioned. Given this premise, and within the frame of reference of this Court's remand, the Board could appropriately say that, on balance, the policy in favor of freedom to contract cannot be invoked by the Company to procure a third opportunity to bargain in good faith, just as if it had never violated the Act, while the effects of its intransigence on the Union's status remain unremedied.

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[6] Company reliance on the Trial Examiner's rationale in *Triangle Plastics*, 166 NLRB No. 86, 65 LRRM 1658, 1967 CCH NLRB 28,286 (1967) as inconsistent with the Board's action here completely ignores the Board's express rejection of that rationale in adopting the Trial Examiner's recommended order. 166 NLRB at p. 2, n. 2, 1967 CCH NLRB at 26,289. Indeed, as this Court noted in its remand decision, the remedy sought in *Triangle*, and denied as inappropriate in that case, is currently being considered by the Board. 128 U.S. App. D.C. at 350, n. 11, 389 F.2d at 301, n. 11.

In *United Aircraft Corp.*, 168 NLRB No. 66, 67 LRRM 1010 (1967), *enforcement pending* (C.A.D.C. 21,469), the Board declined to order the execution of a contract when it found that no agreement was reached. Thus the Board reached the same factual conclusion that the Court did in *Retail Clerks International, supra*. The union's request for an order requiring a contract execution to remedy general violations by the Company was denied, in the Board's exercise of its discretion, when the only unfair labor practice found was the premature withdrawal of recognition from the incumbent union.

## CONCLUSION

For the reasons stated, we respectfully submit that the petition for review should be denied and the Board's order enforced in full.

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